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No. 994

In the Supreme Court of the United States

OCTOBER TERM, 1946

WILLIAM F. ROKEY AND HAROLD McGOWND, ET AL.,
PETITIONERS

v.

DAY & ZIMMERMANN, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 8

Armour & Co. v. *Wantock*, 323 U. S. 126 ..... 7, 9

Bell v. *Porter*, No. 993, October Term, 1946 ..... 6, 7

Bowers v. *Remington Rand*, No. 995, October Term, 1946 .. 6

Skidmore v. *Swift & Co.*, 323 U. S. 134 ..... 5, 6, 7, 8, 9

Statutes:

Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*) Sec. 7 2

Miscellaneous:

Interpretative Bulletin No. 13 (1940 Rev.) Wage and Hour Division, United States Department of Labor 9

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OPINIONS BELOW

No opinion was rendered by the United States District Court for the Southern District of Iowa. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 172–179) is reported at 157 F. 2d 734.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered on November 8, 1946 (R. 179). The petition for certiorari was filed on February 7, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioners, firemen employed at an ordnance plant under a two-platoon work schedule which was established, with the consent of such firemen, by contract subject to the prior approval of the Wage and Hour Administrator and which included duty time and sleeping time, can recover premium pay, liquidated damages and attorneys fees under the Fair Labor Standards Act for such sleeping time where both courts below have held, on all the facts and circumstances of the case, that such time was noncompensable resting time.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201 *et seq.*, provides in pertinent part:

> SEC. 7 (a). No employer shall, * * *, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *
>
> (3) for a workweek longer than forty hours * * *
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

At all times material to this suit, respondent operated the Iowa Ordnance Plant under a cost-plus-a-fixed fee contract with the War Depart-

ment,[1] and petitioners were employed at the plant as fire fighters (R. 2, 173). Prior to September 5, 1943, plant firemen had worked under a three-shift system whereby each shift worked eight hours per day six days a week (R. 21, 33, 137). In the spring of 1943, the institution of the two-platoon system at the Iowa Ordnance Plant was suggested by the Army Ordnance Department (R. 138). Under this system, the work week was divided into two shifts of twenty-four consecutive hours on alternate days (R. 105). The employees were to be paid for sixteen of these hours (from 8 A. M. to midnight) and during the remaining hours (from midnight to 8 A. M.) were to be free to sleep in facilities provided for that purpose by the company (R. 105). If called to duty during this sleeping period, they were to be paid for hours worked (R. 105). Time and one-half was to be paid for hours worked in excess of forty hours per week (R. 106). This plan was submitted to the Wage and Hour Division, United States Department of Labor, which stated that the introduction of the plan would be approved, provided the following conditions were met: (1)

[1] Respondent, in this case, is a "cost-plus contractor" who had entered into a contract with the War Department pursuant to which the contracting agency, or the United States, is or may be obligated to reimburse the contractor for money paid in resisting or settling claims arising out of work performed under the contract. Defense of this action was undertaken by the Department of Justice at the request of the War Department.

that for the 8 hours when the employees were not to be regarded as working they were to be free to sleep; (2) that employees be paid for any time during the eight hours they might be required for fire calls or fire fighting purposes; (3) that the arrangement be mutually satisfactory to the employer and the employees (R. 122). The plan was approved by the firemen (R. 107–114) and was instituted by respondent on September 5, 1943 (R. 21, 34, 46, 137). No employer pressure was exerted to obtain acceptance of the plan (R. 23, 40, 50, 131–132, 134, 136, 138), and the evidence indicates that the firemen approved it because of the benefits that would accrue to them following its adoption (R. 40, 134, 137–138).

Both of the other conditions specified by the Wage and Hour Division were complied with by respondent (R. 160). Thus respondent supplied petitioners' sleeping quarters (R. 19), beds (R. 31), mattresses, bedding, laundry service and heat, all without charge (R. 43, 53, 54). An electric refrigerator and an electric stove were similarly supplied for petitioners' comfort and convenience (R. 53–54). During the sixteen-hour paid period petitioners averaged approximately three to four hours per day active work (R. 136, 139); the remainder of the time they were free to relax, play cards, listen to the radio and engage in other enjoyable pursuits (R. 24, 54, 139). They were permitted to retire at any time after 10 P. M. (R. 36, 42, 48, 55, 94, 134), which allowed ample time

for eight hours of uninterrupted sleep (R. 26, 37, 94). Though the petitioners were subject to call during their rest periods, these calls were infrequent, averaging less than one call per three-month period for each petitioner (R. 127–129). Full payment was made for each such call (R. 19, 26, 52, 94). When a man was required to stand a radio watch during the rest period he was allowed eight hours of sleep during some other part of the day (R. 35).

The instant action was instituted to obtain compensation for the entire rest period from midnight to 8:00 A. M. as working time under the Fair Labor Standards Act (R. 2, 174–175). At the conclusion of all the evidence both parties moved for a directed verdict. Petitioners' motion was overruled, respondent's motion was granted and judgment was entered accordingly [2] (R. 159–162). The court below affirmed (R. 179). After disposing of petitioners' objections as to the admissions and exclusions of evidence in the trial court, the appellate court, relying on *Skidmore* v. *Swift & Co.*, 323 U. S. 134, found that the evidence conclusively showed that petitioners were given eight hours

[2] Respondent's motion for directed verdict rested primarily on the grounds that the evidence before the court was not sufficient upon which to base a verdict in favor of petitioners, that the two-platoon system was voluntarily entered into and clearly understood by petitioners, and that petitioners had been fully compensated for all extra time worked by them (R. 161).

of sleeping time and that this nonactivity was not compensable working time (R. 179).

ARGUMENT

The narrow factual issue here involved is the same as that presented by *Bowers* v. *Remington Rand,* No. 995, and *Bell* v. *Porter,* No. 993. As stated in the Government's brief in opposition in the *Bowers* case, we believe that the circuit courts of appeals have correctly disposed of this issue in all three cases and that no question of sufficient importance to warrant review by this Court is presented.[3]

1. For the reasons indicated in our brief in opposition in the *Bowers* case (Br. in Opp. No. 995, pp. 9–12), we submit that the principles announced by this Court in *Skidmore* v. *Swift & Co., supra,* are dispositive of the instant action. Petitioners urge that they are entitled to compensation for their sleeping time because they remained on respondents premises subject to call. Thus they seek to have this Court make a new contract for the parties.[4] In support of their claim, petitioners assert that they were required to perform various miscellaneous tasks during their rest period and that there was in reality no distinction between

[3] As shown in our brief in the *Bowers* case, the Government's position herein has been consistently upheld and there is no conflict (Br. in Opp. in No. 995, p. 15).

[4] As to the significance of the contract in these cases see pp. 13–14 of our brief in opposition in No. 995.

the period from 8:00 A. M. to midnight and the period from midnight to 8:00 A. M. (Pet. 16). We perceive no merit to this argument. Although petitioners performed various miscellaneous tasks during their rest period, these tasks were trivial and for the most part could have been performed before midnight. Their performance during the rest period was not required (R. 132, 135, 136) and, in any event, did not prevent petitioners from having eight hours uninterrupted sleep (R. 26, 37, 44, 94). No claim is made that these miscellaneous tasks should be regarded as work for which compensation is due (R. 39). At the most, petitioners were in some degree deprived of some freedom of action. Under the rule of the *Skidmore* case, that, of course, is not determinative of the question here involved.

In the companion case *Bell* v. *Porter, supra,* it is urged in the petition for writ of certiorari, and by reference made applicable to this case (Pet. *Bell* v. *Porter,* No. 993, pp. 7–8), that, in the instant action, the court below misapplied the principles of the *Skidmore* case and *Armour & Co.* v. *Wantock,* 326 U. S. 126. *Id.* p. 12. In support of this contention, it is argued that the Administrator of the Wage and Hour Division is in some doubt as to whether sleeping time is compensable,[5] and that, in determining this

[5] It is asserted that, in his brief *amicus curiae* filed in the *Skidmore* and *Wantock* cases (at p. 13), the Administrator stated that while the contention that uninterrupted sleeping

question, the most important factors to be considered are those indicating the party to whom the predominance of benefits accrue.[6] *Id.* p. 11. This argument indicates that those petitioners misconceive the import of the *Skidmore* decision; and that they have ignored the specific ruling of the Administrator to the effect that in the circumstances of this case, sleeping time is not compensable (R. 121–122).

2. Petitioners urge that their sleeping time is compensable since it falls within the definition of statutory work week announced by this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. There it was stated that "Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place, the time spent in these activities must be

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time was compensable was not without merit, the more reasonable view as expressed in Interpretative Bulletin No. 13, is that such time should be excluded from the workweek. This argument does not aid petitioners in the *Bell* case since the Administrator, in the instant action, specifically approved the wage payment scheme of the two platoon system (R. 121–122). On the other hand, the Administrator's brief *amicus curiae*, *supra*, clearly indicates that the Government's position in the instant case has received consistent administrative approval. *Id.* p. 13.

[6] There is nothing in the record to show that the institution of the two-platoon system was predominantly for the employer's benefit. On the contrary, the record supports the view that the predominance of benefits accrued to the employees. See *supra*, p. 4.

accorded appropriate compensation."[7] This general rule, however, was addressed to an entirely different factual situation, and cannot be said to modify or in any manner affect the principles announced by this Court in the *Skidmore* case. Cf. *Armour & Co.* v. *Wantock,* 323 U. S. 126, 132–133.

CONCLUSION

For the reasons above stated, we submit that the petition for writ of certiorari should be denied.

Respectfully submitted.

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[7] The Fair Labor Standards Act contains no express guide as to the manner of computing hours of work. Prior to this decision, the Administrator of the Wage and Hour Division had defined "hours worked" as "all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed work place." Interpretative Bulletin No. 13, par. 2, *op. cit.* R. 145. This, however, was termed a general rule to be followed only in an ordinary case. It was recognized that it was not applicable to all employment situations, *id.* pars. 4–17 (R. 146–156), and that whether or not waiting time constituted working time for the purposes of the Act depended upon the facts of each case, *id.* pars. 6–7. A similar conclusion was reached by this Court in the *Skidmore* case.

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